IN THE HIGH COURT OF JUDICATURE AT BOMBAY

O.O.C.J.

REVIEW PETITION NO.15 OF 2007

IN

NOTICE OF MOTION NO.332 OF 2007

IN

SUIT NO.2108 OF 1999

...

Bank of Baroda ...Plaintiff

v/s.

Deepak Raghuvir Wagle & Anr. ...Defendants

...

Ms.J.M. Sidhwa i/b M/s.Kadwani & Co. for the Plaintiff.

Mr.D.D.Madon,Sr.Counsel appointed as Amicus Curie for the Prothonotary & Sr.Master, High Court.

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CORAM: D.K.DESHMUKH &

J.H.BHATIA, JJ.

DATED: 12TH SEPTEMBER,2007

JUDGMENT: (PER D.K.DESHMUKH, J.)

1. This Review Petition has been placed before us pursuant to the order passed by the Hon'ble the Chief Justice.

2. The circumstances giving rise to the filing of this Review Petition are, Suit No.2108 of 1999 was filed Bank of Baroda. It appears from the record that the suit was fixed on the board of the Prothonotary & Sr.Master on 12-10-2006 for directions, because it was not clear whether the Plaintiff had effected service of writ of summons on the Defendants. On 12-10-2006, none appeared before the Prothonotary & Sr.Master, therefore, the matter was adjourned to 4-12-2006. The order reads as under:-

"Plaintiffs and their advocate absent.

Adjourned to 4-12-2006."

On 4-12-2006, again the Plaintiffs and their advocate were absent and therefore, the matter was adjourned for dismisal. The order reads as under:-

"Plaintiffs and their advocate are absent.
Adjourned for one week for dismissal."

On 11-12-2006, the matter again appeared on the board of Prothonotary & Sr.Master for dismissal. That day again the Plaintiffs and their advocate were absent. Therefore, following order was made:-

"Plaintiffs and their Advocates are absent.
They were absent on the earlier occasion also. It is not known whether the Defendants have been served or not. Suit dismissed for default."

3. It appears that the Notice of Motion No.332 of 2007 was taken out by the Plaintiffs for setting aside the order passed by the Prothonotary & Sr.Master dismissing the suit. That Notice of Motion was decided by a learned single Judge of this court

(Hon'ble Mr.Justice A.M.Khanwilkar). The learned Judge held that the question that is required to be answered for deciding that Notice of Motion was whether the Prothonotary & Sr.Master has the power to dismiss the suit for default. The learned Judge after referring to the provisions of Rule 986 of the High Court (O.S.) Rules has held that,

> "On the plain language of this Rule, it is obvious that the plaint can be rejected for non removal of office objections and not for default of Advocates or parties to appear before the Prothonotary and Senior Master when the plaint is placed under caption 'direction'.

The learned single Judge found that the Prothonotary & Sr.Master does not have power to dismiss the suit for non-appearance of the parties or their advocates and therefore allowed the Notice of Motion setting aside the order passed by the Prothonotary & Sr.Master and restored the suit.

4. It appears that the Prothonotary & Sr.Master submitted a office note to the learned Judge pointing

out that the observations of the learned Judge in the order dated 3rd April, 2007 that the Prothonotary & Sr.Master does not have power to dismiss the suit for default is contrary to what is held by another learned single Judge of this Court (Hon'ble Mr. Justice S.H.Kapadia as he then was) in his order dated 27th April, 1998 passed in Notice of Motion No.1716 of 1996.

5. It appears that the office note was decided to be treated as a Review Petition by the learned Judge (Hon'ble Mr.Justice A.M.Khanwilkar). That Review Petition was heard by the learned Judge and disposed of by order dated 6th July, 2007. The learned Judge referred to the judgment of Justice Kapadia, referred to above in detail and observed that according to him the view taken by Justice Kapadia is not correct view of the law and thereafter the learned single Judge has observed thus:

> 8. For the aforesaid reasons, I have my own doubt about the correctness of the statement of law expounded in the order dated 27th April, 1998, which is pressed into service by the Prothonotary to urge that the Prothonotary has power to dismiss the suit for non-appearance of plaintiffs/advocates and secondly that the Prothonotary on sufficient cause being shown on a praecipe can set aside

> his Order, so passed, of dismissing the suit and restore the suit to the file to its original number.
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> 9. The only appropriate course to observe judicial discipline is to refer the matter to the Division Bench for an authoritative pronouncement on this aspect.

6. It appears that thereafter the papers were placed before the Hon'ble the Chief Justice and the Hon'ble the Chief Justice directed the matter to be placed before us.

7. As the question to be considered was of wider implication and as nobody was appearing for the Defendants, though the Plaintiff was represented, we appointed Mr.D.D.Madon, Sr.Counsel as Amicus Curie. He accordingly consented to assist us in this matter.

8. We have heard the learned counsel appearing for the Plaintiff as also Mr.D.D.Madon, Sr.Counsel at length.

9. Perusal of the order passed by Mr. Justice Kapadia shows that according to him when the Prothonotary dismisses a suit when it is fixed before the Prothonotary for non-appearance of the parties, an application has to be first made to the

Prothonotary showing sufficient cause for restoration of the suit and it is only thereafter that the court can be moved. Justice Kapadia has in term held that the Prothonotary has power to dismiss the suit for default of appearance. For arriving at that conclusion he has referred to various provisions of the High Court (O.S.) Rules. Perusal of the judgment of Justice Khanwilkar shows that, according to him, power to dismiss the suit for default is the power of the court and unless that power is specifically delegated to the Prothonotary, the Prothonotary does not get that power. Following paragraph from the order of Justice Khanwilkar dated 6th July, 2007 is clear in this regard.

> 4. There can be no dispute that the power to dismiss the suit for default or non-appearance of plaintiffs/advocates as well as the incidental power to set aside such order and restore the suit is the prerogative of the Court. Be it with reference to the inherent powers of the Court or express provisions in the Code of Civil Procedure. That power can be exercised by the Prothonotary only if it were to be expressly delegated by the statutory Rules. There can be no implied power in that behalf in the Prothonotary merely because the Prothonotary has power to pass conditional order, the consequence of which is dismissal of the suit, in absence of express Rule for that purpose.

10. The power of this Court to try a civil suit is

contained in Clause 11 and Clause 12 of the Letters Patent. Clauses 11 & 12 of the Letters Patent read as under:-

> Clause 11. Local limits of the ordinary jurisdiction of the High Court.
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> . And we do hereby ordain that the said High Court of Judicature at Bombay shall have and exercise ordinary original civil jurisdiction within such local limits as may from time to time, be declared and prescribed by any law made by the Governor in Council, and until some local limits shall be so declared and prescribed, within the limits of the local jurisdiction of the said High Court of Bombay at the date publication of these presents, and the ordinary original civil jurisdiction of the said High Court shall not extend beyond the limits for the time being declared and prescribed as the local limits of such jurisdiction.
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> Clause 12. Original jurisdiction as to suits
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> . And we do further ordain that the said High Court of Judicature at Bombay, in the exercise of its ordinary original civil jurisdiction, shall be empowered to receive, try, and determine suits of every description, if, in the case of suits for land or other immovable property such land or property shall be situated, or in all other cases if the cause of action shall have arisen, either wholly, or, in case the leave of the Court shall have been first obtained, in part, within the local limits of the ordinary original jurisdiction of the said High Court or if the defendant at the time of the commencement of the suit shall dwell or carry on business, or personally work for gain, within such limits; except that the said High Court shall not have such original jurisdiction in cases falling within the jurisdiction of the Small Cause Court at Bombay, or the Bombay City Civil Court.

The power of the High Court to frame rules to regulate its procedure is contained in Clause 37 of the Letters Patent. Clause 37 reads as under:-

> Clause 37. Regulation of proceedings
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> . And We do further ordain that it shall be lawful for the said High Court of Judicature at Bombay from time to time to make rules and orders for the purpose of regulating all proceedings in civil cases which may be brought before the said High (163) Court, including proceedings in its Admiralty, vice Admiralty, intestate, and matrimonial jurisdiction respectively : Provided always that the said High Court shall be guided in making such rules and orders as far as possible by the provisions of the Code of Civil Procedure, being an Act passed by the Governor General in Council, and being Act No. VIII of 1859, and the provisions of any law which has been made amending or altering the same by competent legislative authority for India.

Perusal of Clause 37 quoted above shows that in framing Rules the court is guided by the provisions of the Civil Procedure Code. Perusal of Section 122 of the Civil Procedure Code shows that Section 122 also confers power on the High Court to frame Rules. Section 122 reads as under:-

> Sec. 122. Power of certain High Courts to make rules -
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> . (High Courts (not being the Court of a Judicial Commissioner) may, from time to time after previous publication, make rules regulating their own procedure and the procedure of the Civil Courts subject to their superintendence, and may by such rules annul, alter or add to all or any of the rules in the First Schedule.

Perusal of the above quoted provisions shows that the High Court has power to make rules to regulate its procedure and it has also power to alter or add to any of the rules in the First Schedule. In exercise of this rule making power the High Court has framed the Bombay High Court (O.S.) Rules 1980. Perusal of Chapter (IV) of the Original Side Rules shows that it deals with institution of the suit. Rule 45 of the Rules shows that a plaint is to be lodged before the Prothonotary for examination. Then, the plaint is to be scrutinised by the office and the office objections are to be notified. After removal of the office objections the plaint is to be admitted. It is Rule 47 which is relevant in this regard. It reads as under:-

> Rule 47. Endorsement on admission.
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> . When a plaint is admitted the words

> "Admitted this day" shall be endorsed thereon and signed by the Prothonotary and Senior Master or by one of his assistants, with words "written statement" being added when such statement is required.

If office objections are not removed within 30 days as per the provisions of Rule 986, the plaint can be rejected. Rule 986 reads as under:-

> Rule 986. Rejection of plaint, memo of appeal, execution application and applications and petition of original nature for non-removal of office objection.
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> . Every plaint, memo of appeal, application for execution and all other applications and petitions of original nature including the petition by an indigent person, in which the Plaintiff/Appellant/Applicant/Petitioner does not remove the office objections within 30 days from the date of lodging the said documents, shall be placed before the Prothonotary and Senior Master for directions, who may reject such documents for non-removal of office objections. Rule 133 of these Rules will apply to such rejection.

Rule 986 makes it clear to such rejection provisions of Rule 133 are applicable. Rule 133 reads as under:-

> Rule 133. Adjournment of matter to Judge
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> . Any party desiring to have any question decided by Prothonotary and Senior Master, whether disputed or not, adjourned to a Judge,

> may apply to the Prothonotary and Senior Master for such adjournment within four days from the passing of the order complained of. If the application is within time, the Prothonotary and Senior Master shall adjourn the matter and put it on the board of the Judge in Chambers. If the party makes the application after the said period of four days, the Prothonotary and Senior Master may adjourn the matter to the Judge in Chambers if he is satisfied that the party had sufficient cause for not making the application in time.

Thus, Rule 133 provides remedy against the order made by the Prothonotary rejecting a plaint.

. After office objections are removed, comes the stage of service of summons. Here, the provisions of Order VII Rule 9 of the Civil Procedure Code are relevant. They read as under:

> Where the Court orders that the summons be served on the defendants in the manner provided in rule 9 of Order V, it will direct the plaintiff to present as many copies of the plaint on plain paper as there are defendants within seven days from the date of such order alongwith requisite fee for service of summons on the defendants.)

It is, thus, clear that it is only on admission of the plaint that an order for service of summons is made. In so far as the Original Side Rules are concerned, provisions in relation to service of writ

of summons are to be found in Chapter VI. Last Rule in Chapter VI is Rule 87. It reads as under:-

> Rule 87. Suits to be placed on board for dismissal if summons not served within six months.
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> . If the Writ of Summons is not served within six months from the date of the filing of the plaint, the Prothonotary and Senior Master shall, unless good cause is shown, place the suit on board for dismissal, the Prothonotary and Senior Master shall notify such suits on his notice board one week before they are placed on the board for dismissal.

In so far as the present case is concerned, it appears that the case is covered by Rule 87. Because the matter was placed on board of the Prothonotary initially to find out whether the writ of summons has been served on the Defendant and as the Plaintiff did not appear and satisfy the Prothonotary that the writ of summons has been served within the period allowed, the suit was placed on board for dismissal and as on that date also the Plaintiff did not appear, it was dismissed for default. Perusal of the judgment of Justice Kapadia shows that he has referred to provisions of Rule 131 of the O.S.Rules. That Rule reads as under:-

Rule 131. Delegation of the Chamber Judge's powers to the Prothonotary and Senior Master and Additional Prothonotary and Senior Master.

The following matters shall be disposed of by the Prothonotary and Senior Master --

(1) Admission and rejection of plaints.

(2) Applications for the appointment of a Guardian-ad-litem of a minor.

(3) Applications for the appointment of a new next friend or a new Guardian-ad-litem of a minor.

(4) Applications for substituted service of the writ of summons and other process.

(5) Applications (formal) to amend the plaint or subsequent proceedings or to strike out any matter therein.

(6) Applications arising from the death, marriage or insolvency of parties to suits, matters or appeals or from the assignment, creation or devolution of any estate or title pendente-lite.

(7) Applications relating to the conduct or frame of suits previous to the hearing, unless the suit is on one of the boards for the day.

(8) Applications for leave to sue or defend as an indigent person.

(9) Applications for discovery and for production and inspection of documents.

(10) Applications for orders of reference to arbitration unless the suit is on one of the boards for the day.

(11) Applications for the taxation and delivery of bills of costs of Attorneys.

(12) Applications for the delivery by an

Attorney of deeds, documents and papers.

(13) Applications for the delivery by an Advocate on record of deeds, documents and papers.

(14) Applications under Rule 73 and 75 for fixing the returnable date of the writ of summons.

(15) Applications under Rule 87 for an order that the suit be not placed on Board for dismissal.

(16) Applications under Rule 127 for short service of summons returnable before the Prothonotary and Senior Master.

(17) To grant refund of Court Fees when orders are passed under Rule 163.

(18) Applications under Rule 176 to enlarge the time to file interrogatories etc.

(19) Applications under Rule 185 for payment of expenses to witnesses.

(20) Applications under Rule 187 or 188 for discharge or change of Advocate except when such applications are made in a criminal case under the Companies Act, 1956,or the Banking Regulations Act, 1949. In such cases the said applications shall be referred to and heard by the Company Judge seized of the criminal case.

(21) Assignment of Advocate under Rule 215 to assist suitors in matters filed by indigent persons.

(22) Applications under Rule 402 for extending time to file affidavit in support of caveat.

(23) Applications under Rule 448 for an order directing the Sheriff to accept the writ of summons for service.

(24) Applications under Rule 631 for translation of document.

(25) Applications under Rule 809 for fixing the returnable date of the notice to appear and answer under the Indian Divorce Act, 1869.

(26) Applications under Rule 859 for depositing powers of Attorney in the registry.

(27) Inquiry under Rule 886 as to the claim of the petitioner who applies for leave to appeal as an indigent person.

(28) Applications for further and better statement of the nature of the claim or defence or for further and better particulars under Order VI, Rule 5 of the Code of Civil Procedure.

(29) Applications under Order XI, Rule 19 of the Code of Civil Procedure, for the furnishing of verified copies and for the discovery of specific documents.

(30) Applications for execution under Order XXI, Rule 50 of the Code of Civil Procedure.

(31) Uncontested applications for commissions to examine witnesses under Order XXVI, Rule 1 of the Code of Civil Procedure.

(32) Applications for extension of time under Order XVII, Rule 7 of the Code of Civil Procedure and generally all applications for further time not otherwise provided for.

(33) Applications for statement of names and address of partners under Order XXX, Rule 1 and applications under Order XXX, Rule 2 of the Code of Civil Procedure. Such of these matters or categories of matters as may be delegated by the Prothonotary and Senior Master to the Additional Prothonotary and Senior Master shall be disposed of by the Additional Prothonotary and Senior Master.

(34) Suits for directions as to which List the Suits should be transferred after service is effected and consequential orders thereto."

. Provided that where any matter appears to

> the Prothonotary and Senior Master or the Additional Prothonotary and Senior Master proper for the decision of the Judge, the Prothonotary and Senior Master or the Additional Prothonotary and Senior Master may refer the same to the Judge in Chambers, and the Judge may either dispose of the matter or refer the same back to the Prothonotary and Senior Master or Additional Prothonotary and Senior Master with such directions as he thinks fit.
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> . Provided further that the Chief Justice may in any particular case, authorise any other Officer of the Court to exercise the powers exercisable by the Prothonotary and Senior Master or Additional Prothonotary and Senior Master under this Rule.

. Perusal of Rule 131 shows that various powers that are conferred on the Chamber Judge are conferred by Rule 131 on the Prothonotary. Perusal of sub-rule (34) of Rule 131 shows that the suit can be fixed before the Prothonotary & Sr.Master for direction. What is the nature of direction that can be given can be found from Rule 157. Rule 157 reads as under:-

> Rule 157. Directions to be given
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> . When a suit appears on the board of the Judge in Chambers for directions, the Judge shall, for the speedy determination of the suit and the avoidance of multiplicity of interlocutory proceedings, give such directions with respect to pleadings, interrogatories, particulars, admission of facts and documents, examination of witnesses, discovery, inspection and production of documents, fixing a date for settling issues

> and for trial of any issues as preliminary issues, fixing a date for hearing of the suit and such other matters, as he may think fit.

. One more aspect which is to be noted at this time is that by sub-rule 1 of Rule 131 power to admit or reject a plaint is conferred on the Prothonotary. Perusal of Rule 11 of order 7 of the CPC shows that one of the reasons for which the plaint can be rejected is where the Plaintiff fails to comply with the provisions of Order IX Rule 9. Rule 9 quoted above casts duty on the Plaintiff to serve the summons on the Defendant after admission of the plaint.

11. We have referred to various provisions of the Letters Patent, the Civil Procedure Code and Original Side Rules to show that the power to deal with a plaint lodged in the court is basically the power of the court, which has been conferred by the court on the Prothonotary by framing the Rules. The validity of the Rules by which various powers of the court have been conferred on the Prothonotary is not in question before us. The question that has been referred to us and that arises for consideration is whether while exercising powers conferred by the

Rules the Prothonotary also gets the power to dismiss the suit or proceedings appearing before him for non-appearance of the parties. The power of the court to dismiss the suit for non-appearance of the parties is undisputed. The only question is whether the Prothonotary will also get the same power.

12. The Supreme Court in its judgment in the case of Jamal Uddin Ahmad v/s. Abu Saleh Najmuddin and anr, AIR 2003 SC 1917, has considered the question where some of the functions of the court can be conferred by the court on sub-ordinate officers. The Supreme Court has held that there can be delegation as also there can be authorisation in favour of the Registry and officials by empowering or entrusting them with authority by permitting few things to be done by them for and on behalf of the court, so as to aid the judges in discharge of judicial functions. The observations made by the Supreme Court in paragraphs 13, 14 & 15 of its judgment are relevant. They read as under:-

> 13. The functions discharged by a High Court can be divided broadly into judicial and administrative functions. The judicial functions are to be discharged essentially by the Judges as per the rules of the Court and

cannot be delegated. However, administrative functions need not necessarily be discharged by the Judges by themselves, whether individually or collectively or in a group of two or more, and may be delegated or entrusted by authorization to subordinates unless there be some rule of law restraining such delegation or authorisation. Every High Court consists of some administrative and ministerial staff which is as much a part of the High Court as an institution and is meant to be entrusted with the responsibility of discharging administrative and ministerial functions. There can be 'delegation' as also there can be 'authorization' in favour of the Registry and the officials therein by empowering or entrusting them with authority or by permitting a few things to be done by them for and on behalf of the Court so as to aid the Judges in discharge of their judicial functioning. Authorization may take the form of formal conferal or sanction or may be by way of approval or countenance. Such delegation or authorization is not a matter of mere convenience but a necessity at times. The Judges are already overburdened with the task of performing judicial functions and the constraints on their time and energy as much as possible in discharging their judicial functions, relieving them of the need for diverting their limited resources of time and energy to such administrative or ministerial functions, which, on any principle of propriety, logic, or necessity are not required necessarily to be performed by the Judges. Receiving a cause or a document and making it presentable to a Judge for the purpose of hearing or trial and many a functions post-decision, which functions are administrative and ministerial in nature, can be and are generally entrusted or made over to be discharged by the staff of the High Court, often by making a provision in the rules or under the orders of the Chief Justice or by issuing practice directions, and at times, in the absence of rules, by sheer practice. The practice gathers the strength of law and the older the practice the greater is the strength. The Judges rarely receive

personally any document required to be presented to the Court. Plaints, petitions, memoranda or other documents required to be presented to the Court are invariably received by the administrative or ministerial staff, who would also carry out a preliminary scrutiny of such documents so as to find that they are in order and then make the documents presentable to the Judge, so that the valuable time of the Judge is not wasted over such matters as do not need to be dealt with personally by the Judge.

14. The judicial function entrusted to a Judge is inalienable and differs from an administrative or ministerial function which can be delegated or performance whereof may be secured through authorization. "The judicial function consists in the interpretation of the law and its application by rule or discretion to the facts or particular cases. This involves the ascertainment of facts in dispute according to the law of evidence. The organs which the State sets up to exercise the judicial function are called Courts of law or Courts of justice. Administration consists of the operations, whatever their intrinsic nature may be, which are performed by administrators: and administrators are all State officials who are neither legislators nor Judges" (see Constitutional and Administrative Law. Phillips and Jackson, Sixth Edition, p.13). P.Ramnath Aiyer's Law Lexicon defines Judicial Function as the doing of something in the nature of or in the course of an action in Court (p.1015). The distinction between "Judicial" and "Ministerial Acts" is: "If a Judge dealing with a particular matter has to exercise his discretion in arriving at a decision, he is acting judicially; if on the other hand, he is merely required to do a particular act and is precluded from entering into the merits of the matter, he is said to be acting ministerially: (pp.1013-14). Judicial function is exercised under legal authority to decide on the disputes, after hearing the parties, may be after making an enquiry, and the decision affects the rights and

obligations of the parties. There is duty to act judicially. The Judge may construe the law and apply it to a particular state of facts presented for the determination of controversy. A Ministerial act, on the other hand, may be defined to be one which a person performs in a given state of facts, in a prescribed manner, in obedience to the mandate of a legal authority, without regard to, or the exercise of, his own judgment upon the propriety of the act done (Law Lexicon ibid.p.1234). In ministerial duty nothing is left to discretion; it is a simple, definite duty. Presentation of election petition to the High Court within the meaning of Section 81 of the Act without anything more would mean delivery of election petition to the High Court through one of its officers competent or authorized to receive the same on behalf of and for the High Court. Receiving an election petition presented under Section 81 of the Act is certainly not a judicial function which needs to be performed by a Judge alone. There is no discretion in receiving an election petition. An election petition, when presented, has to be received. It is a simple, definite duty. The date and time of presentation and the name of person who presented (with such other particulars as may be prescribed) are to be endorsed truly and mechanically on the document presented. It is a ministerial function simpliciter. It can safely be left to be performed by one of the administrative or ministerial staff of the High Court which is as much a part of the High Court. It may be delegated or be performed through someone authorized. The manner of authorization is not prescribed.

15. The High Court, in authorizing an official to receive an election petition either by collective decision of all the Judges or under the directions of the Chief Justice of the High Court, does not ‘delegate’ any of its functions, much less a judicial function; it merely ‘authorizes’ an official to do an act incidental to the main judicial function of trial of an election petition which is entrusted to the High Court

> exercisable ordinarily by a single Judge of the High Court assigned by the Chief Justice for that purpose. Such authorization whether made by rules of the High Court or by decision of the Court or by an order of the Chief Justice shall hold good unless there be a provision to the contrary in the Act or in the Rules framed by the Central Government in exercise of the powers conferred by Section 169 of the Act, which there is none.

13. It is clear from the above that the Supreme Court has held not only that conferal of such powers on the sub-ordinates by the court is valid, but the Supreme Court has also noted the necessity of doing so. In view of the above quoted judgment of the Supreme Court, now the position is clear that the court can validly confer some of its power on the sub-ordinates. The question to be considered is whether the grant of power to the Prothonotary to reject the plaint conferred by Rule 986 for non-removal of the office objection or conferal of power on the Prothonotary by Rule 87 to dismiss a suit for non-service of writ of summons would also by necessary implication confer power on the Prothonotary to reject the plaint or to dismiss a suit when the Prothonotary finds that though the suit is being placed on the board repeatedly for the purpose of finding out whether the Plaintiff has removed the objections or that the summons are served

the party does not appear before the Prothonotary to satisfy the Prothonotary that the objections are removed or the summonses have been served. In this regard the established rule that an express grant of statutory power carries with it by necessary implication, the authority to use all resonable means to make such grant effective becomes relevance. That rule has been considered by the Supreme Court in its judgment in the case of Income Tax Officer, Cannanore v/s. M.K.Mohammed Kunhi, AIR 1969 SC 430. Following observations from that judgment are relevant.

> "It is a firmly established rule that an express grant of statutory power carrier with it by necessary implication the authority to use all reasonable means to make such grant effective (Sutherland Statutory Construction, Third Edition, Articles 5401 and 5402). The powers which have been conferred by Section 254 on the Appellate Tribunal with widest possible amplitude must carry with them by necessary implication all powers and duties incidental and necessary to make the exercise of those powers fully effective. In Domat's Civil Law, Cushing's Edition, Vo.1 at page 88, it has been stated:
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> . "It is the duty of the Judges to apply the laws, not only to what appears to be regulated by their express dispositions but to all the cases where a just application of them may be made, and which appear to be comprehended either with in the consequences that may be gathered from it."
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> Maxwell on Interpretation of Statutes, Eleventh Edition contains a statement at p.350

> that "where an Act confers a jurisdiction, it impliedly also grants the power of doing all such acts, or employing such means, as are essentially necessary to its execution. Cui jurisdictio data est, ea quoqu concessa esse vindenture, sine quibus jurisdictio explicari non potuit." An instance is given based on Ex Parte, Martin, (1879) 4 QBD 212 at p.491 that "where an inferior court is empowered to grant an injunction, the power of punishing disobedience to it by commitment is impliedly conveyed by the enactment, for the power would be useless if it could not be enforced."

. It is clear from the above quoted paragraph from the Judgment of the Supreme Court in the case of Mohd.Kunhi referred to above that grant of statutory power carries with it by necessary implications the authority to use all reasonable means to make such grant effective. The judgment of the Supreme Court in Mohd.Kunhi case has also been considered by the Supreme Court in the its judgment in the case of Jamal Uddin Ahmad (supra). The observations of the Supreme Court in paragraphs 10 & 11 of that judgment, in our opinion, are relevant. They read as under:-

> 10. Dealing with "Statutes conferring power; implied conditions, judicial review". Justice G.P.Singh states in the Principles of Statutory Interpretation (Eigth Edition 2001. at pp. 333, 334) that a power conferred by a statute often contains express conditions for its exercise and in the absence of or in addition to the express conditions there are also implied conditions for exercise of the power. An affirmative statute introductive of a new law directing a thing to be done in a

certain way mandates, even if there be no negative words, that the thing shall not be done in any other way. This rule of implied prohibition is subservient to the basic principle that the Court must, as far as possible, attach a construction which effectuates the legislative intent and purpose. Further, the rule of implied prohibition does not negative the principle that an express grant of statutory power carries with it by necessary implication the authority to use all reasonable means to make such grant effective. To illustrate, an Act of Parliament conferring jurisdiction over an offence implies a power in that jurisdiction to make out a warrant and secure production of the person charged with the offence; power conferred on Magistrate to grant maintenance under Section 125 of the Code of Criminal Procedure, 1973 to prevent vagrancy implies a power to allow interim maintenance; power conferred on a local authority to issue licences for holding 'hats' or fairs implies incidental power to fix days therefor; power conferred to compel cane growers to supply cane to sugar factories implies an incidental power to ensure payment of price. In short, conferment of a power implies authority to do everything which could be fairly and resonably regarded as incidental or consequential to the power conferred.

11. "For a long time the Courts have, without objection from Parliament, supplemented procedure laid down in legislation where they have found that to be necessary for this purpose. But before this unusual kind of power is exercised it must be clear that the statutory procedure is insufficient to achieve justice and that to require additional steps not frustrate the apparent purpose of the legislation", said Lord Reid in Wiseman v. Boardman, (1971) AC 297, 308. "If a statute is passed for the purpose of enabling something to be done, but omits to mention in terms some detail which is of great importance (if not actually essential) to the proper and effectual performance of the work which the statute has in contemplation, the Courts are

> at liberty to infer that the statute by implication empowers that detail to be carried out". (Craies on Statute Law, Seventh Edition. p.111). Cui Jurisdictio data est, ea quoque concessa esse videnture, sine quibus jurisdictio explicari non potuit- "Where an act confers a jurisdiction, it impliedly also grants the power of doing all such acts, or employing such means, as are essentially necessary to its execution". (See.Maxwell on Interpretation of Statutes, Eleventh Edition, p.350). Referring to Maxwell (ibid), Sutherland's Statutory Construction and Domat's Civil Law, the law was thus stated, as a "firmly established rule", by this Court in Income-tax Officer, Cannanore v. M.K.Mohammed Kunhi (1969) 2 SCR 65, that an express grant of statutory power carries with it by necessary implication the authority to use all reasonable means to make such grant effective. In Chief Executive Officer & Vice-Chairman. Gujarat Maritime Board v. Haji Daud Haji Harun Abu & Ors. (1996) 11 SCC 23, this Court held that the conferal of incidental and ancillary powers necessarily flows from the conferal of the substantive power. "It is well settled that where a substantive power is conferred upon a Court or Tribunal, all incidental and ancillary powers necessary for an effective exercise of the substantive power have to be inferred".

. By the Rules framed by it, the High Court has conferred certain powers on the Prothonotary to reduce, to some extent, the burden on the court's board. Power to see that all the objections to the plaint are removed by the Plaintiff is conferred on the Prothonotary, because, the Court does not want to spend its time on getting the office objections removed and in the opinion of the Court, the

Prothonotary is competent to do the job. The intention of the Court as a Rule making authority, while conferring above referred power on the Prothonotary was that when the plaint comes before the Court for hearing all the office objections raised to the plaint should have been removed, so that the court can begin the hearing, without it being required to see that the plaint is in order and has been filed in compliance with the Rules. The power conferred on the Prothonotary to see that all objections that are raised to the plaint are removed, to see that the writ of summons on the party is duly served within a reasonable time, cannot be effectively exercised by the Prothonotary without the Prothonotary getting power to reject the plaint or dismiss the suit for failure of the Plaintiff to appear before the Prothonotary to satisfy the Prothonotary that he has removed all the objections or that the writ of summonses have been served on all the Defendants. If such a power is not conceded to the Prothonotary, this is how the matter would proceed. The Prothonotary would issue his board listing matters in which according to the Prothonotary's record objections have not been removed, and where according to record of the

Prothonotary the summonses have not been served. If the parties to the proceedings do not appear before the Prothonotary, the Prothonotary will have no option but to adjourn to another day those matters in which the parties have not cared to appear. The Prothonotary will have to go on doing this day after day in the hope that on some day the party would appear before him and ultimately the matters will land up on the board of the court itself, and then the court will have to deal with those matters. That will defeat the very purpose for which those powers have been conferred by framing Rules on the Prothonotary. It has been the experience of all courts that even before the court, which admittedly has the power to dismiss any matter when the parties do not appear, in number of matters the parties do not care to appear and the court is forced to dismiss the matter for default. In our opinion, judicial notice can be taken of this unfortunate situation, that exist in every court. In this situation, in our opinion, if the Prothonotary does not have the power to dismiss a matter listed before him for default of appearance, practically nobody would care to appear before the Prothonotary. With the result, all the matters will have to be listed before the court.

Therefore, in our opinion, power to dismiss that matter for default, which the Prothonotary has been given power by the Rules to reject is also conferred on the Prothonotary by necessary implications. Possession of such a power by the Prothonotary is necessary, so that the Prothonotary can effectively exercise the power expressly conferred on him by the Rules i.e. power to reject plaint for non-removal of office objections, power to dismiss a suit for non-service of summons on the other side within a reasonable time etc. If, on the other hand, it is held that the Prothonotary does not possess the power to dismiss a matter for default, then it will result in the Prothonotary not being in a position to effectively exercise the power expressly conferred on him by the Rules and thus the very purpose of framing the Rules in relation to conferal of certain powers on the Prothonotary may be defeated.

14. In our opinion, therefore, the view taken by the learned single Judge (Hon'ble Mr.Justice Khanwilkar) that the Prothonotary will not get power to dismiss the suit for non-appearance of the parties unless it is specifically delegated to the Prothonotary by the court, cannot be accepted, in view of the judgments

of the Supreme Court which we have referred to above.

15. In our opinion, the view taken by the learned single Judge (Hon'ble Mr.Justice Kapadia, as he then was) is in accordance with law.

16. Before parting with the judgement, we consider it our duty to thank Mr.D.D.Madon, Sr.counsel, who agreed to address us, at our request, as Amicus Curie in the matter.

17. We accordingly hold that whenever the matter is listed before the Prothonotary, in accordance with the Original Side Rules, and the parties do not appear before the Prothonotary, the Prothonotary will have the power to dismiss the matter for default of appearance.

18. Reference is, thus, accordingly answered.

(D.K.DESHMUKH, J.)

(J.H.BHATIA, J.)

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